NO. 683.

IN THE

United States Circuit Court of Appeals.

FOR THE NINTH CIRCUIT.

HOME LAND & CATTLE COMPANY, a Corporation, and the NATIONAL BANK OF COMMERCE, a Corporation.

Appellants.

vs.

CORNELIUS J. McNAMARA and THOMAS A. MARLOW, Co-partners under the firm name and style of McNAMARA & MARLOW.

Appellees.

REPLY BRIEF OF APPELLANTS.

Appeal from the Circuit Court of the United States for the District of Montana.

FILED
MAY 7 - 1901

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REPLY BRIEF OF APPELLANTS.

In the brief of Appellants heretofore filed in this case, we have laid down as one of our propositions that the respondents committed a breach of the contract in suit (Brief page 58), and in support thereof the following proposition was asserted:

"By their action in refusing to pay for a delivery of cattle, or to pay for any cattle thereafter delivered, except on their own terms, respondents attempted to insert a new term in the contract, a condition to which appellants were not obliged to submit so long as they were without default."

And in support of this proposition a large number of

authorities were cited (Brief p. 62-65:) Counsel for respondents have apparently misunderstood our contention upon this phase of the case, and assert that we have cited these authorities in support of the contention "That the *mere fact of* a failure on the part of a purchaser to make a payment on such a contract as this one entitles the vendor to rescind the contract on his part."

This misinterpretation of our views was perhaps natural in view of the criticism of the case of *Mersey Company vs. Naylor*, found at the bottom of page 63 of our brief. The language of this criticism is inaccurate and we desire to withdraw it. It has no bearing upon the argument which we were trying to make, nor if true, would it be necessary to support the proposition we were contending for.

The case of *Mersey Company vs. Naylor*, is correctly quoted in the paragraph preceding the criticism as laying down the rule that the failure to pay for an installment is not such a breach of the contract as entitles the vendor to rescind, *unless it shows an intention to be no longer bound by the contract.* With the exception to the rule thus expressed, the case is not only not opposed to reason, or the weight of authorities, but is directly in line with the cases cited by us and supports our contention as expressed in the proposition laid down at the commencement of this brief. Very full abstracts of the various opinions delivered in that case, are to be found in the opinion of the court in *West vs. Bechtel, 84 N. W. 68*, also cited by respondents, and it will be noted that each of the

Justices and the Lords of Appeal concur with Chief Justice Coleridge, who tried the case, in holding that "The true question is whether the acts and conduct of the parties evince an intention to be no longer bound by the contract." And the language of the Chief Justice in *Freeth vs. Burr*, is quoted with approval by Jessel M. R. as follows:

"Now non-payment on the one hand or non-delivery on the other may amount to such an act or may be evidence for a jury of an intention wholly to abandon the contract and set the other party free. If you have the act so done on the one side, the other party, if he elects to be free, is no longer liable to perform his part of the contract."

And again Lindley L. J. says:

"Now I certainly do not pretend to reconcile all the cases on this subject. I can understand each case by itself, but there is a very considerable difficulty in reconciling them. It is not, however, necessary to do so. What we have to do is to extract from the cases some intelligible principle by which to be guided, and it appears to me that the principle is stated accurately in *Freeth vs. Burr, L. R. 9 C. P. 208*, by Lord Coleridge himself in delivering his judgment in that case. What he says as to the result of the case is 'The true question is whether the acts and conduct of the parties evince an intention no longer to be bound by the contract.' I think that is the fair way of testing each of these cases, and it appears to me that Lord Coleridge either lost sight of that in deciding this case, or drew an incorrect inference from the correspondence."

And the rule as thus laid down was followed in the case of *West vs. Bechtel*, cited by respondent, in this, that the trial court instructed the jury that to warrant the defendant in refusing to perform his part of the contract by the delivery of the wood that "It ought to be made to appear that there was not merely a refusal to pay at once for the portion already delivered, but the circumstances connected with the whole matter, the conduct of both parties, ought to be taken into consideration and it should be made to appear to warrant the defendant in refusing to further deliver, that the conduct of the plaintiff was such as indicated that he did not intend to perform his part of the contract."

And we have not contended and are not now contending for any other rule in this case. In our criticism of the decision in *Mersey Company vs. Naylor*, we meant to be understood as saying that the decision of Lord Coleridge upon the facts was more in accord with what we believed to be the weight of authority, to-wit: that such acts as were there in evidence evinced an intention to be no longer bound by the contract. See also *Roehm vs. Horst, 91 Fed. 345*, where a contention as to the legal status of the seller did not relieve the buyer from performance.

Counsel for respondents on page 12 of their brief cite the case of *Robertson vs. Davenport, 27 Ala. 574*, as holding that if the plaintiffs in that case had ceased to have the ability to comply with their contract, when the money which was sued for became due, and the defendant knew that fact, he might refuse to pay for the hams

sued for and might recoup his damages. That is exactly the proposition which we are contending for in this case. When the respondents found out that the appellants were unable to deliver the full nine thousand head, they might under certain circumstances have refused to accept further deliveries, or if deliveries had been made for which payment had not been made, they might have recouped their damages in an action by the appellants upon the contract for such payment. But that is as far as the authorities go. This distinction is very clearly brought out by Lord Bowen in the case of *Mersey Company vs. Naylor*, where he says:

"If Lord Bramble in *Honck vs. Muller*, is to be understood as saying that the doctrine can no longer be applied when the contract has been performed, it seems to me that this observation goes beyond what can be supported; for as the Master of the Rolls has pointed out many of the cases where one party was allowed to treat the conduct of another as putting an end to the contract, were cases in which the contract had been part performed. *A fallacy may possibly lurk in the use of the word 'rescission.'* It is perfectly true that a contract, as it is made by the joint will of the two parties, can only be rescinded by the joint will of the two parties; but we are dealing here not with the right of one party to rescind the contract, *but with his right to treat a wrongful repudiation of the contract by the other party as a complete renunciation of it.*"

And we thought that our meaning upon this proposition was made clear by our quotations from the articles in the Harvard Law Review. But for fear of further misunderstanding we again repeat that when the respondents ascertained that there would be a shortage of

the agreed number of steers, it was their duty to elect whether to refuse to accept further deliveries under the contract because of this shortage and sue for damages, or to continue performance of the contract until completion. They elected, by the acceptance of the delivery of October 21st, to continue performance of the contract and thereby kept alive the agreement on their part to make payments according to the terms of the contract. When they refused to make the payment, unless the appellants adjusted at that time the damages for the steer shortage, according to the void terms of clause nine, they attached a condition, which was not a part of the original contract, and which they had no right to do, thereby giving to the appellants the right to elect whether to proceed, or to accept such action on the part of the respondents as a repudiation of the contract on their part, which would excuse the appellants from further deliveries. These propositions, we again assert, are supported, not only by the authorities cited by the appellants, but also by the authorities quoted and relied upon by the respondents; and in view of the misunderstanding of counsel as to our contention, based upon an inaccurate expression of our views of the case of *Mersey Company, vs. Naylor*, we respectfully ask permission of the court to submit this brief in response to what has been said by the respondents.

Respectfully submitted,

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